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No. 89-2023

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BRADLEY RICHIE,

Petitioner,

v.

THOMAS A. COUGHLIN, III, INDIVIDUALLY AND AS COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES; THE DEPARTMENT OF CORRECTIONAL SERVICES; KAREN S. BURSTEIN, INDIVIDUALLY AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE AND AS PRESIDENT OF THE CIVIL SERVICE COMMISSION; JOSEPHINE L. GAMBINO AND JAMES J. MCFARLAND, EACH INDIVIDUALLY AND AS COMMISSIONERS OF THE CIVIL SERVICE COMMISSION; THE CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK; AND THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,

Respondents.

REPLY BRIEF

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September 4, 1990

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ARGUMENT

POINT I

NO FACTS MATERIAL TO PETITIONER'S DUE PROCESS CLAIM ARE IN DISPUTE.

Respondents claim that the petition distorts the facts. (Resp. brief, p.2) In fact, it is respondents' brief which contains several important inaccuracies. Those that are relevant[1] to the due process claim will be corrected in this reply brief. No debate over minor factual inconsistencies, however, should be allowed to detract from the Court's consideration of this petition.

This case was decided on cross-motions for summary judgment (Pet., App. C at 6) because no facts material to petitioner's due process claim were in dispute. As acknowledged by the Appellate Division, this case is very similar to *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). (Pet., App. C at 7) The entire judicial record in this case is only 146 pages long. This case briefly and precisely presents the important question of whether the New York courts have properly applied *Loudermill*, and would be an appropriate case for this Court to review.

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[1]Respondents begin their brief by asserting that the petitioner has untruthfully alleged that his ". . . escape from jail was due to his attending church" and chastise the petitioner for alleging facts not supported by the record. (Resp. brief, p.2) Like other such statements in respondents' brief, these assertions are themselves inaccurate and unsupported by the record. The petition does *not* say that petitioner escaped "due to his attending church," as misportrayed at page 2 of respondents' brief, but "after" attending church. (Pet., p.6) This statement *is* supported by the record. The petitioner alleged in his Section 1983 complaint:

> Concerned with the welfare of his wife and children and suffering from recurrent nightmares regarding the trauma of his Vietnam experience, Mr. Richie walked away from a church service he was attending off prison grounds on March 14, 1971. At that time he had served only four (4) months of his prison sentence. [App. I at 1.]

The respondents' answer denied "knowledge or information sufficient to form a belief as to the truth of this allegation."

There is no support in the record for respondents' statement that Mr. Richie escaped from a work detail. The Record citations given by respondents for this propo-

POINT II

THE APPELLATE DIVISION AND THE RESPONDENTS HAVE MISAPPREHENDED THE SCOPE OF PETITIONER'S PROPERTY RIGHTS.

Under New York *Civil Service Law* §75, petitioner successfully completed his probationary term and became subject to removal only for incompetency or misconduct. Notwithstanding this law, under New York *Civil Service Law* §50(4), his appointment was subject to revocation for additional, enumerated "causes." No revocation for cause can take place without notice and an opportunity to respond. *CSL* §50(4)(h). Since petitioner could not be removed from his employment except upon a finding of "cause," he had a protected property interest in his continued employment. *Loudermill*, at 470 U.S. 532, 538-539; and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982).

Respondents say, however, that petitioner's property interest was limited to an expectation that he would receive a fair, discretionary[2] review of mitigating factors because he was guilty of the falsification charge. (Resp. brief, p.10-11) Indeed, the Appellate Division found that since facts had been "discovered" to show that Mr. Richie falsified his employment application, his property interest was limited to ". . . an expectation that where there are sufficient mitigating circumstances he will not be terminated." (Pet., App. C at 8). Respondents conclude that ". . . New York's Legislature limited the scope of the presumed right to continued employment where an applicant cheated

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sition are pp. 107, 20. (Resp. brief, p.2) No such allegation is contained at these pages or elsewhere in the record. [App. I at 10.] Most importantly, the circumstances of petitioner's escape are wholly immaterial to the due process issue in this case. The petitioner regrets that the brief mention of the circumstances of his escape engendered this needless debate.

[2]A property interest based solely on the expectation that discretion will be fairly exercised would not seem to be any property interest at all. The discussion of the exercise of discretion in *Loudermill* was in the context of an employee who was subject to removal only for *cause*. *Id.*, at 538-539.

another deserving candidate out of a job by lying on the employment application." (Resp. brief, p.10)

This reasoning is tautologically true. One can just as truly say that the liberty rights of a convicted felon are more limited than those of a person who has merely been accused. But such reasoning misses the point. Neither the scope of the liberty interest nor the procedural due process rights of an accused are determined by the State's "discovery" that the accused is guilty. By finding that respondents were free to make the initial finding or "discovery" of cause without following due process procedures (Pet., App. C at 7,8), the Appellate Division missed the real question in this case. That question, properly stated, is: if an employee has a protected property interest in continued employment by virtue of holding employment which can only be terminated for cause, what process is required to insure that cause is properly found and, if cause is found, to insure that the decisionmaker's discretion is fairly exercised as to penalty?

As noted in *Loudermill*, 470 U.S. at 540-541, there has been considerable confusion in this area. The Appellate Division's decision reflects a misunderstanding of this Court's *Loudermill* holding. Either review by this Court, or a remand for reconsideration in light of *Loudermill* and *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), is warranted.

POINT III

PETITIONER DID NOT RECEIVE THE PRETERMINATION NOTICE AND OPPORTUNITY TO RESPOND REQUIRED BY *LOUDERMILL*.

The respondents' brief (pp. 2-3) makes much of the fact that petitioner eventually received notice that his appointment had been revoked. This, of course, is obvious. How could Mr. Richie have invoked his post-termination appeal rights or brought this 1983 action without learning that his appointment had been re-

voked? The real point is that a public employee who has a protected interest in his employment must receive *pretermination* notice of the charges against him, an explanation of the employer's evidence, and a brief opportunity to respond. *Loudermill*, 470 U.S. at 546. That is not what happened here.

Petitioner's employment was terminated by a notice dated July 22, 1985. (Pet., App. C at 5). That petitioner received a copy of this notice from the Department of Labor the following September, and from Civil Service the following October (Resp. brief, pp. 2-3), hardly means that petitioner received pretermination notice. Indeed, the Appellate Division expressly found that Mr. Richie was "undeniably" denied pretermination notice. (Pet., App. C at 9) It merely held that the post-termination award of backpay remedied this deprivation. *Id.*

A posttermination award of backpay hardly compensates for the lost opportunity to invoke the discretion of the decisionmaker prior to termination. *Loudermill*, 470 U.S. at 543. Here, the reopening of petitioner's case, over two months after his termination (Resp. brief, p.3), was prompted by an internal memorandum criticizing Civil Service's handling of the case. (Pet., App. C at 5) The Department's letter, accordingly, contains disclaimers and self-justification about why the earlier letters had been misdirected. App. I at 2. The author of the letter — the same investigator who made the initial decision — was clearly as concerned with justifying his initial mistakes[3] as with properly deciding petitioner's case.

This case presents the discrete legal issue of whether a posttermination award of backpay completely remedies the failure to provide the pretermination procedural safeguards required by *Loudermill*. This issue warrants the review of this Court.

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[3]Not only were the notices sent to the wrong address, the initial determination was based on erroneous accusations that Mr. Richie had been convicted of a felony narcotics possession, and that he avoided detection by changing the spelling of his name, his date of birth, and his Social Security number. (Pet., App. C at 5)

POINT IV

NEW YORK LAW DOES NOT PROVIDE A CONSTITUTIONALLY ADEQUATE POSTDEPRIVATION REMEDY.

The respondents say petitioner was only entitled to a limited posttermination hearing to review the decisionmaker's exercise of discretion. (Resp. brief, p.12) The respondents incorrectly explain that petitioner was denied a plenary hearing because he never challenged the decisive facts. (Resp. brief, pp.4-5). The fact is that the consistent position taken by the Department of Civil Service was that Section 50(4) ". . . neither provides for nor requires any hearing." App. I at 4.[4] In fact, in denying Mr. Richie's request for a hearing, the Civil Service expressly cited *Mingo v. Pirnie*, 55 N.Y.2d 1019, 449 N.Y.S.2d 478 (1982), which makes it clear that Section 50(4) provides for no hearing.[5] App. I at 4, 5.

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[4]This letter appears at pages 46-47 and 101-102 of the record. These are the record citations given by respondents for the proposition that petitioner did not receive a plenary hearing because there was no factual dispute.

[5]Respondents' assertion that a plenary hearing will be granted under *Civil Service Law* §50(4) where the material facts are in dispute (Resp. brief, p.4, fn.2) ignores the most recent authoritative cases which address this issue. The concurrence in *Mingo v. Pirnie*, 55 N.Y.2d 1019, 1020, 449 N.Y.S.2d 478, 479 (1982), states:

> [Section 50(4)] . . . requires no more than the person to be disqualified be 'given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.' It provides for no hearing and gives no authority to require one by the agency.

The Appellate Division decision in *Mingo* shows that even though the operative facts in that case were in dispute, no hearing was required under Section 50(4). *Mingo v. Pirnie*, 78 A.D.2d 984, 985, 433 N.Y.S.2d 886, 887 (Hancock, J., dissenting) (4th Dept. 1980).

Adler v. Lang, 21 A.D.2d 107, 248 N.Y.S.2d 549 (1st Dept. 1964) does not stand for the proposition cited by respondents. The court in *Adler*, referring to section 50(4), stated: "Admittedly, those provisions do not mandate a statutory disqualification hearing." *Id.* at 110, 111, 248 N.Y.S.2d at 549. The court went on to note that a hearing was required only because the New York City Civil Service Commission had adopted a *rule* requiring such a hearing. *Id.* at *111*, 248 N.Y.S.2d at 554.

Reisman v. Codd, 54 A.D.2d 878, 389 N.Y.S.2d 89 (1st Dept. 1976) did conclude that no hearing would be ordered because there was no triable issue of fact. Neverthe-

New York's posttermination procedure is plainly inadequate. The appeal to the Civil Service Commission is not governed by written procedures. While New York's *State Administrative Procedure Act* (McKinney 1987) requires such procedures, (*SAPA* §§102(3), 301(3)); these sections do not apply because, as determined by the Appellate Division, appeals under *CSL* §50(4) need not be held "on the record." (Pet., App. C at 9,10) Because there are no procedures, the employee need not receive a statement of the charges or of the issues to be considered.

The respondents belittle this complaint, asserting that the only issue was the falsification charge — the other charges having been "expressly withdrawn." (Resp. brief, pp.3-4) While the other charges *may* have been withdrawn, how was the petitioner to know this? The respondents cite, but do not supply, two letters. (Resp. brief, p.3) Assuming that these letters (App. I at 4, 6), can be read as withdrawing the other charges, the respondents overlooked the fact that these were internal memoranda between the Department of Corrections and Civil Service. Neither was supplied to the petitioner prior to the hearing.

Respondents' contention that the issue was limited to the falsification charge contradicts the main holding of the Appellate Division — that the purpose of the appeal was to insure a fair, discretionary review of mitigating factors. (Pet., App. C at 8,9) If the only purpose of the hearing was to review facts raised in mitigation, then the intentional falsification charge was not even at issue.

Of course, a number of factual issues *were* raised and disput-

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less the Court expressed doubt about the holding in *Berns v. Civil Service Commission*, 537 F.2d 714 (2d Cir. 1976) — that a hearing in cases under Section 50(4) are mandated by the dictates of due process. *Id.* at 878, 389 N.Y.S.2d at 89. This holding, in light of the more recent Court of Appeals' decision in *Mingo*, hardly shows that the "consistent" rule is that a plenary hearing will be held where there is a factual dispute.

ed at the hearing.[6] This is difficult to prove without a transcript, but the Court should note the Appellate Division's finding that the Commission ". . . considered a variety of aggravating and mitigating factors. . . ." (Pet., App. C at 8)[7] Most importantly, the Commission got to hear Mr. Richie's explanation of the intentional falsification charge.[8]

The respondents' defense of the submission of *ex parte* evidence also does not withstand scrutiny. The Appellate Division held as a matter of law, that the appeal of the revocation decision was not required to be "on the record" (Pet., App. C at 9) While the Appellate Division noted the *ex parte* submission of evidence (Pet., App. C at 6), it did not discuss whether this offended due process, but merely made the conclusory finding that the posttermination review procedure was sufficient. (Pet.,

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[6]Respondents call petitioner's description of the hearing a "blatant misrepresentation." (Resp. brief, p.4) This needless aspersion is particularly inappropriate in the absence of a hearing transcript.

[7]These aggravating and mitigating facts included Mr. Richie's mental state (he was diagnosed as suffering from post-traumatic stress syndrome as a result of his service in Vietnam); his employment record; and his DWI arrests.

[8]The respondents assert that Mr. Richie never denied that he falsified his application and say that his application was "admittedly" false. (Resp. brief, p.13) The respondents' brief also claims (p.5, fn.3) that petitioner distorts the facts by claiming that the record contains no "proof" of a falsified application. The respondents again misstate the petition — even placing quotation marks around words not used by petitioner. The petition does *not* say that there is no "proof" in the record that petitioner's employment application contained a false statement. The petitioner's own complaint, as noted by respondents, properly alleged these facts. The petition *does* say that the record contains no "admission" that Mr. Richie *intentionally* falsified his application (Pet., p.25). This is the statutory standard under *CSL* §50(4).

To supply this admission, which is crucial to respondents' argument that there was no factual dispute and no need for a plenary hearing, the respondents relied on a newsclipping. App. II. This was apparently submitted by Department of Correctional Services to the Commission, *ex parte*. It was submitted by respondents to the New York Supreme Court in an answering affidavit, which alleged: "It should be noted that the facts of this case, namely the falsification of plaintiff's application are not in dispute. Plaintiff admitted that he committed fraud by ommission. Attached hereto as Exhibit P is a copy of an interview with the *Watertown Daily Times* dated August 13, 1985, wherein that admission was made." (This appears at page 77 of the judicial record.) Of course, Mr. Richie's statement to the Commission on this issue was not preserved.

App. C at 9) Ignoring the legal issue thus presented, the respondents merely argue that the *ex parte* submission of evidence in this case was not prejudicial. Even if it were this Court's function to review the evidence, the respondents have mischaracterized the evidence that was submitted. Respondents describe an *ex parte* report by the Department of Civil Service to the Civil Service Commission as: ". . . nothing more than a routine 'bench memo' of the type law clerks routinely prepare for courts. Moreover, there was nothing unfair or biased in the memo." (Resp. brief, p.13) This description is wholly inapt. A bench memo is prepared by a judge's law clerk and presumably is restricted to a synopsis of matters contained *in the record* before the court, as well as of the arguments of the parties.

In this case, the report was prepared by the Department of Civil Service, the agency whose decision was being reviewed. Its interests were adverse to the petitioner. Its report is thus more closely analogous to a party's brief except, unlike a brief, the report discusses evidence not adduced on the record. The concluding paragraphs of this report are telling:

> There have been several references by Mr. Richie's counsel . . . contending that he has led an exemplary life since his North Carolina offense. In considering any mitigating circumstances, the Department suggests that the Commission may wish to make note of Mr. Richie's very recent offenses. Specifically, his June 10, 1985 arrest for driving while intoxicated — disposition pending; and three months ago, September 1985, a second arrest in Canton, New York — again for driving while intoxicated — disposition pending. An article in the *Watertown Daily Times* dated September 21, 1985 headline reads, "Prison Staffer Charged Again." His escape from North Carolina and affiliation with Ogdensberg Correctional Facility was cited along with the first DWI arrest in New Hampshire.

> New York State Department of Correctional Services Employee Manual Rule 2.1 states, "No employee, whether on or off duty, shall so comport himself as to reflect discredit upon the department or its personnel." Mr. Richie's behavior does not support that contention. [App. I at 13.]

This was not the only evidence submitted *ex parte*. The August 13, 1985 article from the *Watertown Daily Times* (Appendix II) has already been noted. Also submitted *ex parte* was a letter dated November 18, 1985, from the Department of Correctional Services to the Department of Civil Service. (This letter was attached to respondents' answering affidavit as Exhibit H; it is attached to this brief as Appendix III). On the face of this document, each of the Civil Service Commissioners is "carbon-copied." It contains this comment: "We have not yet received dispositions on Mr. Richie's driving while intoxicated arrests of *June 1985 and September 1985*. We have been advised by the district attorney of St. Lawrence County that depending upon the disposition of the June 1985 arrest, Mr. Richie may be charged with another felony."

In the absence of rules, the parties were free to submit whatever they chose, even by writing directly to the Commissioners. Petitioner submits that an elementary part of due process is that the decisionmaker base its decision on facts adduced at the hearing and that the accused be given the opportunity to see the evidence and the chance to rebut it. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Brock*, 481 U.S. at 264-265.

The respondents' final point is that judicial review is available under New York *Civil Practice Laws and Rules* Article 78, to determine whether the ". . . Commission's decision was arbitrary or illegal, or without a foundation in substantial evidence . . ." (Resp. brief, p.12) Judicial review should be part of a due process scheme for the review of the termination of a protected interest in public employment. *Loudermill*, 470 U.S. at 545-548; *see also*, *Brock*, 481 U.S. at 261-262, 263. Petitioner has no problem with New York's judicial review mechan-

ism. The problem is that the procedures leading to judicial review do not provide a record adequate to permit proper review.

As noted, the Commission is not required to hold the appeal "on the record." There are no written procedures. Evidence can be submitted *ex parte*. There is no transcript, and "witnesses" are not sworn. Few or no findings of fact or conclusions of law are made, and decisions in similar cases are not indexed or reported. How then can a reviewing court properly decide whether the Commission acted illegally, arbitrarily or without a basis in evidence?

CONCLUSION

The procedures outlined in *Loudermill* and *Brock* are not onerous. All that would have been required in this case would have been to assure, prior to termination, that petitioner had notice and an opportunity to respond. A simple posttermination hearing, on written rules and stated charges, at which the petitioner was allowed to present evidence and in mitigation, and to see all of the evidence submitted against him, would have sufficed. Such protections do not exist in cases under New York *Civil Service Law* §50(4). This case should be accepted for review.

Respectfully submitted,
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September 4, 1990

APPENDIX I

COMPLAINT

11. A few months before his arrest, Mr. Richie's first wife left him, taking his two children. Prior to his arrest, Mr. Richie had been unsuccessful in locating them.

12. Concerned with the welfare of his wife and children and suffering from recurrent nightmares regarding the trauma of his Vietnam experience, Mr. Richie walked away from a church service he was attending off prison grounds on March 14, 1971. At that time he had served only four (4) months of his prison sentence.

13. From 1973 to 1977 Mr. Richie attended Mesa College in Grand Junction, Colorado. He graduated with a Bachelor of Arts degree in Human Services. After divorcing his first wife, Mr. Richie married for a second time in 1980.

14. Mr. Richie was appointed on January 10, 1983 to a position with the State of New York Department of Correctional Services as a Temporary Release Interviewer, Grade 14. His work location was Ogdensburg Correctional Facility, Ogdensburg, New York.

15. Mr. Richie successfully completed his probationary period and received a permanent appointment on December 20, 1983.

16. On Saturday, June 8, 1985, Mr. Richie was stopped by police in Grafton County, New Hampshire and charged with driving

EXHIBIT C — LETTER
(STERRETT — 10/7/85)

October 7, 1985

Mr. Bradley Richie
99 Miner Street
Canton, New York 13617

Dear Mr. Richie:

It has been brought to the attention of the Investigations Bureau that you did not receive our correspondence of July 8, 1985 and July 22, 1985 notifying you that the Department of Civil Service had revoked your appointment of January 10, 1983 as a Temporary Release Interviewer with the Department of Correctional Services. As procedure requires, we correctly mailed our correspondence to your last known address. It was returned by the Post Office "Addressee Unknown."

It is our understanding that you have obtained, through other sources, a copy of the July 22, 1985 letter stating the reasons for the revocation under the provisions of Section 50.4 of the Civil Service Law. In addition, we have received correspondence representing the interests of Vietnam Veterans requesting a review of this matter in light of the fact that you did not have an opportunity to submit in writing any pertinent facts or explanations regarding the derogatory information submitted by the Department of Correctional Services. They have also supplied us with your current address.

Although the revocation decision has been made, we will again afford you an opportunity to make an explanation and to submit facts in opposition to the determination made on July 22, 1985. We have attached a copy of that decision. In addition to the derogatory information, your explanation should include why you checked the box designated "No" as to question 11D of your application of May 14, 1981 ("Have you ever been con-

victed of any crime [felony or misdemeanor]''). See the copy attached.

After receipt of your explanations, the Investigations Bureau will review their July 22, 1985 decision and you will be immediately notified. If we determine that our July 22, 1985 decision was correct, you will have thirty days from the date of that notification to appeal the determination to the Civil Service Commission.

Your cooperation is appreciated.

Sincerely,

John F. Sterrett
Director
Investigations Bureau

Enclosures: copy of July 22, 1985 letter
copy of XD-10 dated May 14, 1981

EXHIBIT I — LETTER
(STERRETT — 11/18/85)

bcc: Comr. Burstein
George Swiers
Harvey Randall
Kathy A. Bennett

Prepared by: Harvey Randall
Sue – 6: Richie
JFS

November 18, 1985

Rebecca L. Caudle, Esq.
Office of General Counsel
New York State Public
Employees Federation
AFL-CIO
159 Wolf Road
Albany, New York 12205-1189

Dear Ms. Caudle:

This is to acknowledge receipt of your letter of November 7, 1985, concerning Mr. Bradley Richie in which you made the representation that an individual disqualified or removed from his or her position pursuant to Section 50.4 is entitled to a hearing or, in the alternative, that such an action is subject to the provisions of Article 33 of the Agreement between the State and PEF (Professional, Scientific and Technical Services Unit).

Section 50.4, while allowing an employee who is to be disqualified to "make an explanation and to submit facts in opposition to such disqualification," neither provides for nor requires any hearing. Indeed, I am informed by Counsel that the Court of Appeals has so ruled in *Mingo v. Pirnie*, 55 NY2d 1019. As to your claim that, in the alternative, Mr. Richie has a right to a disciplinary hearing prior to such disqualification, disqualification is not in the nature of a disciplinary action. Accordingly, Article 33 does not obtain.

As my letter of October 7, 1985 indicates, the basis for Mr. Richie's proposed disqualification by this Agency was his falsifying his application for Examination 25-236, Temporary Release

Interviewer, by answering "No" to question 11.D.: "Have you ever been convicted of any crime (felony or misdemeanor)?" Mr. Richie has not, to date, responded to my October 7 letter. Thus, the record before me now shows only unrebutted information supplied to this agency indicated that Mr. Richie had been convicted of a crime in 1970.

For the reasons indicated hereinabove, your request for a hearing is denied. You may appeal my determination disqualifying Mr. Richie to the Civil Service Commission. For this purpose, your letter of November 7, 1985 will be deemed a timely notice of your intent to file an appeal on behalf of Mr. Richie with the Commission.

Sincerely,

John F. Sterrett
Director
Investigations Bureau

cc: Nicholas Vagianelis

bcc: Chron
File

Photo: Mr. Joseph A. Murphy, Jr.
Director of Personnel
Department of Correctional Services

EXHIBIT J — LETTER
(STERRETT 11/22/85)

bcc: Commissioner Burstein
K. Bennett
J. Keefe
N. Vagianelis
G. Swiers

November 22, 1985

Mr. Joseph A. Murphy, Jr.
Director of Personnel
Department of Correctional Services
State Office Campus, Building 2
Albany, New York

Bradley Richie
337-36-9057

Dear Mr. Murphy:

By now you should have received a copy of my November 18, 1985 letter to Rebecca Caudle, attorney (P.E.F.), representing Mr. Bradley Richie. This case will be scheduled for a hearing before the State Civil Service Commission, perhaps as soon as December 17, 1985.

Our disqualification was based on Mr. Richie's alleged falsification of his application for examination wherein he indicated that he had never been convicted of a crime.

In your letter dated June 17, 1985 to Mr. Healy, you indicate that Mr. Richie apparently avoided detection by altering (a) his name; (b) date of birth; and (c) social security number. In order that we present as complete a record as possible to the Commission, we require copies of the documents upon which you relied in arriving at this conclusion.

Only Mr. Richie's application dated May 14, 1981 (substantiating the charge that he falsified his application for examination 25-236, Temporary Release Interviewer, by answering "no" to question 11D) is part of the record.

Thus, the record to be presented to the Civil Service Commission is silent as to your claim that the candidate "avoided detection of his record by dropping the 't'; changing his date of birth and altering his Social Security Number."

Since these allegations were part of your agency's justification in its recommending that Mr. Richie be disqualified, this is to officially request copies of all information in your files that would support your allegations that Mr. Richie has, in fact, attempted to deceive this agency by altering his name, date of birth and, or, social security number.

I would appreciate receiving this material no later than November 29, 1985.

Sincerely,

John F. Sterrett
Director
Investigations Bureau

JFS:HR:bjb
bdc:File
Chron

EXHIBIT L
REVIEW DOCUMENT

For Civil Service Commission Review
Item 4.37
December 17, 1985

NAME

Bradley L. Richie (Social Security No. 337-36-9057)

SUBJECT

The matter of revocation of the January 10, 1983 permanent appointment as a Temporary Release Interviewer from eligible list #25-236 of Bradley L. Richie.

PERSONAL DATA

Date of birth:	July 19, 1946 (age 39)
Marital status:	Married

MILITARY RECORD

1963-67	U.S. Marine Corps, Honorable Discharge

EDUCATION

June 1977	B.A., Mesa College, Colorado; psychology and human services.

EMPLOYMENT HISTORY*

7/22/85	Revocation of permanent appointment by Civil Service.
1/83-7/22/85	Permanent appointment, Temporary Release Interviewer, Department of Correctional Services.
7/80-1/83	Unknown.
4/80-7/80	Camelot Boys Home, Lake Placid, New York; Child Care Worker; counseled and

	taught social skills to disturbed and adjudicated youths.
1/79-4/80	Colorado Boys Ranch; Child Care Worker; teaching behavior modification skills to emotionally disturbed or adjudicated youths.
9/78-1/79	Unknown.
5/78-9/78	Collbram Job Corps Center, Colorado; group aide; assisting young persons to relearn social and cultural skills.
6/77-5/78	Unknown.

*(Although former employment was not part of the basis for this revocation, a letter was sent to appellant requesting a more complete employment/or unemployment history.)

BASIS FOR REVOCATION

Correctional Services in their letter to the Investigations Bureau dated June 17, 1985 requested revocation of Mr. Bradley Richie's permanent appointment as a Temporary Release Interviewer: the employee should be disqualified under Section 50.4 as a result of (1) falsifying his application for Examination 25-236 by answering "No" to question 11.d: "Have you ever been convicted of any crime (felony or misdemeanor)?" and (2) apparently avoided detection by altering (a) his name; (b) date of birth; and (c) social security number.

After consulting with the Department's Law Bureau, we mailed a Notice of Possible Disqualification on July 8, 1985 to Mr. Richie at his last known address. After ten days, on July 22, 1985, we mailed a revocation letter stating the above offenses as the basis. Both notices were returned by the Postal Service. The Investigations Bureau was informed by Correctional Services that Mr. Richie was being transported to North Carolina since he waived extradition.

ARRESTS AND CONVICTIONS

Charge	Disposition
8/6/70 Arrest for Felony Narcotic possession, Raleigh, North Carolina	11/70 Convicted of misdemeanor, possession of marijuana, sentenced to 18 months in prison; however, escaped 3/14/71 after serving 4 months.
6/8/85 Arrest for driving while intoxicated, Grafton, New Hampshire.	Charges pending.
6/10/85 Recognition of Mr. Richie as person wanted for escape in North Carolina; extradited to North Carolina (waived extradition).	7/25/85 Escape charge dismissed. Released and paroled on drug charge. Court ordered immediate termination of supervision. Certificate of Parole dated 8/6/85.
9/9/85 Arrest, Canton, New York, for driving while intoxicated.	Charges pending.

COMMENTS

Nothing further was heard concerning this case until we received a call on September 25, 1985 from George Swiers, Head of the Department's Vietnam Veterans Unit, inquiring into the basis for the July 22, 1985 revocation. On September 30, 1985, Mr. Swiers forwarded a memo to Investigations suggesting that the information concerning attempts to avoid detection was questionable.

- Apparently through the efforts of another Vietnam Veterans Advocate in Rochester, Mr. Swiers was asked to "look into" this case. Mr. Swiers supplied Investigations with a current address and this case was immediately reopened.

In his memo, Mr. Swiers states that Mr. Richie was given a copy of Investigations' revocation letter by the Department of Labor on September 9, 1985 when appellant's claim for unemployment insurance was denied.

On October 7, 1985, a letter was sent to the appellant stating what had occurred and our efforts to contact him at the last known address. We requested an explanation concerning the alleged offense, specifically the falsification of the Department's examination application. We stated that upon receipt of his explanation the Investigations Bureau would review the July 22, 1985 determination and rescind it if not correct. In addition, Mr. Richie was advised that if the revocation were to stand, he would have thirty days from the date of our second notice to appeal to the Civil Service Commission.

The Investigations Bureau asked Correctional Services how for 2½ years that the appellant was employed they did not discover this offense. The verbal response was that something went askew concerning Mr. Richie's fingerprints. Since Correctional Services will have representatives at the hearing the Commission may wish to explore this further.

APPELLANT'S RESPONSE

Mr. Richie did not personally respond to our October 7, 1985 letter reopening the case. Instead, Rebecca L. Caudle, Attorney (P.E.F.), responded (11/7/85) on his behalf requesting a hearing before a neutral adjudicator and reinstatment retroactively with full back pay. After a review of Ms. Caudle's letter by the Department's Counsel's Office, a reply drafted by Mr. Harvey Randall for the Investigations Bureau denying her requests was processed and mailed on November 18, 1985. This communication to Mr. Richie's attorney clearly indicated that the basis for her client's revocation by this agency was his falsification of the Department's application by answering "No" to question 11.d.

Ms. Caudle also contends that Mr. Richie has led an exemplary life during the last fifteen years by securing a college edu-

cation, held productive and legitimate jobs, and North Carolina has dismissed the escape charge and released him. Her letter of November 7 was deemed a timely notice of intent to file an appeal on behalf of Mr. Richie with the Commission.

As of this date, we have not received a reply either from Mr. Richie or his attorney explaining why he falsified the Department's examination application.

INVESTIGATIONS BUREAU

The Investigations Bureau's review of this case, after receiving additional information from Mr. G. Swiers, Ms. R. Caudle, and Correctional Services, confirmed the decision to disqualify Mr. Richie and revoke his permanent appointment as a Temporary Release Interviewer.

The Investigations Bureau has modified the basis for that decision. Originally we included *all* charges by Correctional Services. However, the evidence is insufficient as of this date to substantiate the charge that Mr. Richie avoided detection by altering his name, date of birth and social security number. The statements by Correctional Services that subject "apparently" made these alterations were further modified in more recent correspondence to infer that they have no evidence that would confirm the alterations were intentionally orchestrated by Mr. Richie, or he was fortunate enough to have such errors made for him. Therefore, in our letter to Mr. Richie's counsel (11/18/85), the only basis stated for this revocation was her client's falsification of his application.

The undisputed facts are that on May 14, 1981, Mr. Bradley L. Richie signed an affirmation on the Department's application (for examination 25-236, Temporary Release Interviewer) which stated that "I affirm that the statements made on this application (including any attached papers) are true, under the penalties of perjury." Question 11.d. asked, "Have you ever been convicted of any crime (felony or misdemeanor)?" Mr. Richie answered in the box marked "No." The Civil Service Department contends that under Section 50.4 the subject ". . .

intentionally made a false statement of (any) material fact in his application; or . . .''

As previously stated, Mr. Richie did not receive our original disqualification notice dated July 22, 1985. However, Department letters dated October 7, 1985 to subject and November 18, 1985 to his attorney, Ms. Caudle, were both received. As of this date, Mr. Richie has failed, neglected, or refused to respond to our request for an explanation concerning his falsification of the examination application. Thus, the record before us is unrebutted as to (a) arrest (August 1970) and conviction (November 1970) of a crime (misdemeanor) and subsequent escape (March 14, 1971) and (b) falsification of Department's application on March 14, 1981. If these offenses were known in 1981 when the application was filed, this Department would have disqualified Mr. Richie for this position.

There have been several references by Mr. Richie's counsel, Ms. Caudle, contending that he has led an exemplary life since his North Carolina offense. In considering any mitigating circumstances in this case, the Department suggests that the Commission may wish to take note of Mr. Richie's very recent offenses. Specifically, his June 10, 1985 arrest for driving while intoxicated — disposition pending; and three months ago, September 1985, a second arrest in Canton, New York — again for driving while intoxicated — disposition pending. An article in the Watertown Daily Times dated September 21, 1985 headline reads, ''Prison Staffer Charged Again.'' His escape from North Carolina and affiliation with Ogdensburg Correctional Facility were cited along with the fiirst DWI arrest in New Hampshire.

New York State Department of Correctional Services Employee Manual Rule 2.1 states, ''No employee, whether on or off duty, shall so comport himself as to reflect discredit upon the Department or its personnel.''

Mr. Richie's behavior does not support that contention.

APPENDIX II

Watertown Daily Times *Tuesday, August 13, 1985*

NAME CLEARED

HE WANTS PRISON JOB BACK

By Martha Ellen

The charges against him dismissed, a former Ogdensburg Correctional Facility staffer fired last month after extradition to North Carolina wants a second chance.

Bradley L. Richie, a veteran who served two tours in Vietnam, admits he made mistakes, but maintains the [S]tate is trying to hide its embarrassment over the situation by making him the fall guy.

Allegations by Ogdensburg Prison Supt. John R. O'Keefe that he used a different spelling of his name, lied about his date of birth and changed his social security number in order to get a job with the Corrections Department are false, Mr. Richie said.

"I committed fraud by omission," he said.

"I assume responsibility for this. I did all this. I just don't think the state's dealing with this the best way they could for everyone concerned. What they're saying is I was wrong for trying to get this job; I was wrong for trying to improve myself," he said.

Mr. Richie said he agreed to an interview with The Times because "I feel so much of the information submitted by (Supt.) O'Keefe was replete with errors, for my own well-being and so people who don't know me will have a better understanding of what happened."

Mr. Richie, 39, was a temporary release interviewer at the prison when he was picked up June 8 by New Hampshire [S]tate

Police in Twin Mountain on a charge of driving while intoxicated.

A computer check showed what dozens of others apparently had not: Mr. Richie was wanted in North Carolina on a nearly 15-year-old warrant.

By his own admission, Mr. Richie walked away from an 18-month sentence he was serving for a misdemeanor charge of drug possession.

At the time of his arrest in July 1970, Mr. Richie said he had recently returned from his second tour in Vietnam, and "I was a casualty of it."

During his final five months in Vietnam, Mr. Richie said he was using opium, and when he returned to an unfriendly home-side, he continued to do drugs.

APPENDIX III

EXHIBIT H — LETTER
(MURPHY — 11/18/85)

November 18, 1985

Mr. John Sterrett
Department of Civil Service
State Campus, Building #1
Albany, New York 12239

Dear Mr. Sterrett:

I have been informed that you consider it necessary to provide additional information pertaining to the revocation of Mr. Bradley Richie's appointment as Temporary Release Interviewer.

When I submitted my request for Mr. Richie's revocation, I believed it may have been of interest to Civil Service to learn why we did not become aware of Mr. Richie's conviction and escape when we ran our initial fingerprint check on him. Therefore, in my letter of June 17, 1985 I provided information we had received verbally from the New Hampshire State Police who told us that when Mr. Richie was arrested for Driving While Intoxicated on June 8, 1985, he gave a spelling of his name (Ritchie) which differed from that on his license and also gave different Social Security Numbers and dates of birth during the two booking processes. When they reentered the spelling of Mr. Richie's name with a "t" (a spelling he gave them) for another NCIC check, they learned of Mr. Richie's escape from the North Carolina prison. We have since received the attached written report from the New Hampshire State Police.

Please note that in my letter I stated "*Apparently*, Mr. Richie avoided detection of his record by 1) dropping the "t" from his name Ritchie to Richie; 2) changing his date of birth from 7/19/49 to 7/19/46; and 3) altering his Social Security number from 237-36-9057 to 337-36-9057."

(Whether Mr. Richie orchestrated the changes in his identification data or whether he was fortunate enough to have such errors made for him is not the issue.) Obviously, since Mr. Richie cannot challenge the substantive issues which formed the basis of our request for his revocation, (i.e. his fraudulent statement on his exam application, his conviction, and his escape) he is attempting to divert your attention from those facts by dealing with the irrelevant issue of how he escaped detection on the NYSPIN computer.

I would like to call your attention to the attached New York State Department of Labor's Decision rendered in response to Mr. Richie's request for unemployment benefits. The administrative law judge noted that

> "Claimant was applying for a sensitive position helping to decide upon parole release when he knew or should have known that there was an outstanding warrant for his arrest in another state for escaping from a minimum security prison . . .
>
> I make no inquiry into the original incident on which the claimant was incarcerated. I make no determination on whether his 18 month sentence was fair. I am concerned with the fact the the claimant decided ex party to shorten his own sentence by walking away from the correctional facility. This information is material to the application of almost any job with the Department of Corrections."

We have not yet received dispositions on Mr. Richie's Driving While Intoxicated arrests of *June 1985 and September 1985.* We have been advised by the District Attorney of St. Lawrence County that depending upon the disposition of the June 1985 arrest, Mr. Richie may be charged with another felony.

Although I do not believe it relevant to our request for a revocation under Section 50.4, I would be glad to send you copies of counseling memoranda and the last evaluation Mr. Richie received on June 5, 1985, to refute any claims which may be

made by Mr. Richie that he was an exemplary employee.

If further information is required, please do not hesitate to contact me.

Sincerely,

Joseph A. Murphy, Jr.
Director of Personnel

JAM:bc
cc: Karen S. Burstein
Josephine Gambino
James T. McFarland